

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 29, 2006

STATE OF TENNESSEE v. KIMBERLY PAIGE SMITH

**Direct Appeal from the Circuit Court for Marshall County
No. 16948 Robert Crigler, Judge**

No. M2006-01221-CCA-R3-CD - Filed February 14, 2007

The appellant, Kimberly Paige Smith, pled guilty in the Marshall County Circuit Court to aggravated burglary and was sentenced as a Range I, standard offender to four years in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Andrew Jackson Dearing, III (at trial and on appeal), and Michael J. Collins (at trial), Shelbyville, Tennessee, for the appellant, Kimberly Paige Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Charles F. Crawford, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On November 23, 2005, the Marshall County Grand Jury indicted the appellant and three co-defendants for one count of aggravated burglary, a Class C felony, and two counts of theft of property valued over \$1000 but less than \$10,000, Class D felonies. On February 22, 2006, the appellant pled guilty to the aggravated burglary charge, and the theft charges were dismissed.

The State recited the following facts at the plea hearing:

These events occurred in Marshall County, Tennessee, on the 8th day of August, 2005.

At that time the home or residence of Roy Rowe here in Marshall County was entered into. A safe or security box was taken.

Police were called. Investigation began. They located the security box and some of the paper contents behind [the appellant's] residence.

They questioned [the appellant]. They questioned Mr. Jeremy Davis, Aaron Fitzgerald and Tara Rowe, who was the ex-wife of the victim in this case.

Everyone confessed to being there. Three of the defendants, including [the appellant], and the two males, gave a statement saying that all of this was Ms. Rowe's idea. She set it up by telling them there would be \$800 in cash in that safe or security box.

The two males went in and got it while [the appellant] and Mrs. Rowe s[a]t out in Mrs. Rowe's vehicle. The males come back with the safe. They take it and throw it up in the air and pop the door open. There wasn't any money in there but there was some other things of value including pills.

The money that was taken was loose change in another container. [The appellant], the two males went into the Kroger store, put that in the cash change machine, got paper money for it, about 20 something dollars, and split it. They split the pills, not necessarily evenly, but they all participated in using the pills.

I believe [the appellant] was the one that said she took several and passed out.

At the sentencing hearing, the State introduced the appellant's presentence report. Additionally, Beth Flatt of the Tennessee Board of Probation and Parole testified that she prepared the report for the twenty-year-old appellant. Ms. Flatt testified that the appellant, as a juvenile, was convicted of joyriding, three counts of theft, two counts of burglary of an automobile, and shoplifting. As an adult, the appellant had prior convictions for vandalism, assault, leaving the scene of an accident, and two counts of driving while license suspended. The appellant was serving three separate probationary terms when the instant offenses were committed.

The appellant testified that she had been incarcerated for 116 days for the instant offenses and had lived with her mother prior to her confinement. She said that she spent time at Centerstone Mental Health at the age of thirteen. At age fourteen, she was admitted to the Middle Tennessee Mental Health Institute following a suicide attempt. She explained that she had been diagnosed with bipolar disorder and anxiety and that she had been in juvenile custody from the ages of thirteen to seventeen. She admitted that she sometimes drank excessively which caused her to do “stupid things.” The appellant testified that although she had not done so in the past, she would abide by the terms of a community corrections sentence because she had “grown up and matured a lot” during the 116 days she had been incarcerated.

Joyce Smith, the appellant’s mother, testified that she had visited the appellant in jail weekly and had noticed changes in the appellant. She explained that the appellant had apologized for her actions and said that she could tell a difference in the appellant’s attitude. Ms. Smith acknowledged that she had placed the appellant in state custody when she was young because she could not control her. Ms. Smith said that the appellant could live with her if granted probation.

At the conclusion of the sentencing hearing, the trial court imposed a four-year sentence in the Tennessee Department of Correction and denied alternative sentencing. The appellant now brings this appeal challenging the trial court’s denial of alternative sentencing.

II. Analysis

The appellant argues that “alternative sentencing was warranted rather than incarceration” because “she does not possess a ‘criminal history evincing a clear disregard for the laws of society.’” Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in her own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of her sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court’s determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

An appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (Supp. 2005). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a Range I, standard offender convicted of a Class C felony; therefore, she is presumed to be a favorable candidate for alternative sentencing.

Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and “evincing failure of past efforts at rehabilitation” is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

In denying alternative sentencing, the trial court noted that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the appellant and that her potential for rehabilitation was poor:

She was in state custody by her own testimony from age 13 to 17 where apparently an effort really is made to try and find a right place for juveniles in trouble.

The reason I point that out is I do find that that shows that her potential for rehabilitation is very poor were she [to] be given alternative sentencing.

... When she went in at age 13 as a juvenile, she had – it goes on for pages of just new convictions that just remain in state custody; remain in state custody; remain in state custody, which shows that her potential for rehabilitation is poor.

And the one criteria is less restrictive measures of confinement have frequently or recently been applied unsuccessfully.

Even restrictive measures have been applied unsuccessfully because she was in state custody and still didn't seem to slow her down or have any effect.

As an adult it appears to me she was on probation in four cases: On August 10, '04 in Marshall County Sessions Court she had leaving the scene, 11/29. Which would have taken her to August 10, '05, . . . which the offense date would have been inside that.

The agg[ravated] assault reduced to simple assault and vandalism. She pled guilty. Both occurred at the same time, two different convictions. Both 11/29. She would have been on that probation.

And then suspended driver['s] license, that was Lewisburg City Court and the Maury County suspended [driver's license] charge, which was six months suspended.

Obviously those were times she was granted probation and it didn't have any meaning to her.

. . . I don't think she would make it any time at all on alternative sentencing. Frankly [I] don't see the need to waste the time on it. I don't think she qualifies for it.

Respectfully it is not an easy decision, because she is young. But she has compiled pages of violations within her 20 years.

I don't believe I am going to grant her alternative sentencing.

I will respectfully deny your request on that.

We conclude that there is sufficient evidence to support the trial court's denial of alternative sentencing based upon the appellant's continued failed efforts at measures less restrictive than confinement. Accordingly, the trial court did not err in ordering the appellant to serve her sentence in confinement.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE